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Supreme Court, U.S.
FILED

No. _____ 97-1576 OCT 15 1997

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In The

Supreme Court of the United States

October Term, 1997

OKWY GODWIN ACHUSI,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

The Attorney General, in her discretion, is authorized to grant suspension of deportation to an alien if the Attorney General determines that the alien is deportable under any law of the United States, except as provided in section 244(a)(2) of the Immigration and Nationality Act ("Act"), 8 U.S.C. section 1254(a)(2), has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application, is a person of good moral character, and is a person whose deportation would result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. The authority of the Attorney General to construe the "extreme hardship" requirement has been narrowly upheld. *INS v. Wang*, 450 U.S. 139 (1981). Various U.S. courts of appeals have interpreted the statute inconsistently,

The question presented is:

(1) Whether the United States Court of Appeals for the Fifth Circuit should grant Petitioner's application for suspension of deportation in light of inconsistent interpretation among the circuit courts of the "extreme hardship" standard?

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THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE PETITIONER FAILED TO ESTABLISH THAT HE WOULD SUFFER EXTREME HARDSHIP IF HE WERE DEPORTED. THE FIFTH CIRCUIT DECISION IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND, AS SUCH WARRANTS CONSIDERATION TO RESOLVE THE CONFLICT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT,

Petitioner, Okwy Godwin Achusi, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on July 17, 1997.

OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the three-judge panel to the United States Court of Appeals for the Fifth Circuit, entered July 17, 1997, is reprinted in the Appendix to the Writ. The Decision and Order of the Board of Immigration Appeals (BIA), dated August 5, 1996, are reprinted in the Appendix to this Writ. The Order and Oral Decision of the Immigration Judge, dated August 1, 1995, are reprinted in the Appendix to this Writ.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals was entered on July 17, 1997, affirming the BIA's decision dated August 5, 1996. The jurisdiction of this court is invoked under 28 U.S.C. section 1254(a) and Sup. Ct. R. 20.1.

STATUTES INVOLVED

This case involves the following provision of the United States Code:

8 U.S.C. section 1254(a)(1), section 244(a)(1) of the Act[1]

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 241(a)(4)(D)) who applies to the Attorney General for suspension of deportation and –
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period, he was and is a person of good moral character; and is a person whose deportation, in the opinion of the Attorney General, would result in extreme hardship to the alien, his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

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[1] Section 244(a)(1) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996). The amendment is not applicable to the instant case.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Petitioner, Okwy Godwin Achusi herein seeks review of the decision of the Court of Appeals for the Fifth Circuit on his Petition for Review taken from the administrative decision by the BIA in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under former 8 U.S.C. section 1105(a), which established the exclusive procedure for judicial review of such administrative decisions.

II. Statement of the Facts

Petitioner is a thirty-nine-year-old male, who is a native and citizen of Nigeria. Petitioner entered the United States on April 15, 1987 at New York as a nonimmigrant visitor.

At the hearing before an Immigration Judge on August 1, 1995, testimony revealed that Petitioner is the father of an infant son, who is a United States citizen. Petitioner testified that he provided support and assistance for the infant and its mother, Ms. Frances Webb, during pregnancy, has done so since the child's birth, and plans to continue to do so. Testimony also revealed that Mr. Achusi serves as a role-model for Ms. Webb's teenage son. Ms. Webb testified that Mr. Achusi purchases clothing, milk and diapers for his child and pays for a baby-sitter. Petitioner does not reside with the mother of his infant son, but visits three times a week. Petitioner maintained contact with the mother of his son during the

pregnancy and with the mother and child, thereafter. However, they mutually decided not to marry.

Mr. Achusi testified that he currently provides economic support for his infant son and is active in his life. In accordance with his upbringing, Mr. Achusi believes that he has a responsibility to help raise his son born out of wedlock. Petitioner further believes that he will be unable to provide financial support for his son if he is ordered to return to Nigeria because of the high unemployment rate there and the limited business opportunity for him as a dry cleaner.

Mr. Achusi further testified that he has been operating his dry cleaning business for four years, has two employees and, if deported, would lose his business and security deposit, as well as become liable for any liquidated damages upon breaking the lease agreement for the premises. He added that his business is located in an area of the city where business development and revitalization are encouraged.

Regarding his health, Mr. Achusi testified that he is being treated for keloids and an ulcer, and would have difficulty getting proper medical care in Nigeria. Petitioner further testified to unfavorable political conditions in Nigeria because of the military rule. He added that he does not have a criminal record, but does have minor traffic violations. He pays taxes and attends a Methodist church.

III. Course of Proceedings and Disposition in the Court Below

Deportation proceedings were initiated against Petitioner by the Immigration and Naturalization Service ("INS") on September 19, 1994 with the issuance of an Order to Show Cause ("OSC"). Mr. Achusi was charged with deportability under section 241 of the Act for remaining for a longer period than authorized after entry into the United States as a nonimmigrant visitor.

At his master calendar hearing, Mr. Achusi conceded deportability and requested the relief of suspension of deportation, and in the alternative, voluntary departure. On August 1, 1995, a hearing on the merits of Mr. Achusi's claim was held before an Immigration Judge. Petitioner's application and supporting documents were admitted to the record. At the conclusion of the hearing, the Immigration Judge denied Mr. Achusi's application for suspension of deportation. Mr. Achusi, who preserved his right to appeal, was granted voluntary departure. The BIA held that Mr. Achusi had failed to prove "extreme hardship" and dismissed the appeal. Upon judicial review, the Fifth Circuit denied Mr. Achusi's petition for review.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The Immigration Judge and the BIA abused their discretion when they concluded that Mr. Achusi failed to satisfy the requirement of extreme hardship meriting suspension relief and did not merit a favorable exercise of discretion. Suspension of deportation based upon

"extreme hardship" may be granted where the petitioner is fully assimilated into American life and culture, speaks English fluently, is involved in various activities in this country, has a U.S. citizen child, runs a small business, is from a country where economic and political conditions are poor, and has no other means of obtaining lawful permanent resident status. *In re O-J-O*, Int. Dec. #3280 (BIA 1996); *In re L-O-G*, Int. Dec. #3281 (BIA 1996).

Petitioner in the instant case has established that his situation is comprised of similar factors, which establish "extreme hardship" meriting suspension of deportation. Petitioner is the father of a U.S. citizen infant son who would suffer extreme hardship if Petitioner is deported. In addition, Petitioner would suffer extreme hardship with regard to his ability to support his infant son, economic losses and his health. Furthermore, Petitioner is fully assimilated into American life and culture after residing in this country for ten years, speaks English fluently, is involved in various activities in his community, runs a small business in a manner that assists the local community, is being treated for keloids and ulcers, has a favorable immigration history, is from Nigeria, where economic and political conditions are in a state of disruption, and has no other means of obtaining lawful permanent resident status.

To establish eligibility for suspension of deportation under section 244(a)(1) of the Act, the petitioner must prove that he has been physically present in the United States for a continuous period of not less than seven years immediately preceding his application; has been a person of good moral character during all of that period; and is a

person whose deportation would result in extreme hardship to himself, or to his spouse, parent or child who is a citizen of the United States or lawfully admitted permanent resident. 8 U.S.C. section 1254(a)(1).

The seminal BIA case to be relied upon in applying the extreme hardship standard is *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978). In *Anderson*, the BIA retreated from the more restrictive view of extreme hardship and discussed what adverse factors must be considered in deciding whether discretionary relief is merited where extreme hardship is alleged. *Anderson*, 16 I&N Dec. at 597. *Anderson* set forth the following factors:

1. family ties in the United States and abroad;
2. length of residence in the United States;
3. condition of health;
4. conditions in the country to which the alien is returnable – economic and political;
5. financial status – business and occupation;
6. the possibility of other means of adjustment of status;
7. special assistance to the United States or community;
8. immigration history;
9. position in the community.

Id.

Regarding the history of the suspension of deportation provision, the first suspension provision, enacted in 1940, required only a showing of "serious economic detriment to a citizen or legally resident alien who is the

spouse, parent, or minor child of such deportable alien." *In re O-J-O*, Int. Dec. #3280 at 25. "In 1952, for a variety of reasons, the socio-political pendulum swung in the opposite direction and Congress enacted the far more restrictive standard of exceptional and extremely unusual hardship." *In re O-J-O*, Int. Dec. #3280 at 26.

Ten years later, Congress retreated from this position, and, while it retained " 'exceptional and extremely unusual' [hardship] as the standard of relief for certain criminal or otherwise deportable aliens under section 244(a)(2) of the Act, 8 U.S.C. section 1254(a)(2), it required a less stringent showing of only extreme hardship for section 244(a)(1) cases," such as this one. *In re O-J-O*, Int. Dec. #3280 at 26. In amending section 244(a)(1) in this remedial manner, Congress intended to lessen the degree of hardship required for suspension of deportation. *In re L-O-G*, Int. Dec. #3281 at 5 (BIA 1996).

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996), there was no statutory definition of "extreme hardship." The "extreme hardship" provision applicable to Mr. Achusi under section 244(a)(1) of the Act must not be blurred with the related but separate "exceptional and extremely unusual hardship" provision under section 244(a)(2) to reduce them to one provision. Nor must it be blurred with the "exceptional and extremely unusual" hardship standard enacted by section 304(a) of the IIRIRA of 1996, which is inapplicable here because of the date of its enactment. Here, the Fifth Circuit Court of Appeals blurred the distinction when it held that Mr. Achusi had failed to establish that he will suffer the type of "unique

or unusually severe" hardship compelling a finding of extreme hardship.

In the analysis of any case involving suspension of deportation, the court should be mindful of the remedial nature of the suspension of deportation provision. *In re L-O-G*, Int. Dec. #3281 at 5. The pivotal question that must be considered by the adjudicating body is: "when does the adjective extreme apply to a sum of human hardship, and how can [one] distinguish this level of inconvenience, discomfort, suffering, misery, or privation from that which is not extreme, or that which is exceptional and extremely unusual." *In re O-J-O*, Int. Dec. #3280 at 27.

Two elements may be considered when distinguishing the lower threshold standard of "extreme hardship" for the more stringent standard of "exceptional and extremely unusual hardship." The first element, corresponding with section 244(a)(1) of the Act, considers the level and degree of hardship caused by a combination of individual factors, including the subjective character of the suffering; the hardship need not be unique or unusual. *Id.* at 29-30. The second element, corresponding to section 244(a)(2) of the Act, contemplates a high level of hardship, plus consideration of the unique character of the hardship. *Id.*

Therefore, legislative history and BIA precedent clearly support a grant of suspension relief.

Among the appellate courts, there is no clear judicial standard by which to measure the "extreme hardship" requirement:

The *Second Circuit* has held that violence and threats that fail to establish political, religious, or ethnic motivation necessary for asylum may nonetheless be probative of extreme hardship required for suspension of deportation. *Blanco v. INS*, 68 F.3d 642 (2d Cir. 1995).

The *Fifth Circuit* has taken a very restrictive viewpoint and requires a showing of hardship that is "uniquely extreme . . . the most severe hardship the alien could suffer." *Hernandez-Cordero*, 819 F.2d 558 (5th Cir. 1987).

The *Seventh Circuit* has held that "relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *See Hernandez-Patino v. INS*, 831 F.2d 750, 752 (7th Cir. 1987) (citing *Bueno-Carrillo v. Landon*, 682 F.2d 143, 146 n. 3 (7th Cir. 1982)). It has further held that extreme hardship required for suspension of deportation will not be found without showing of "significant actual or potential injury, in sense that petitioner will suffer hardship substantially different from and more severe than that suffered by ordinary alien who is deported" and that general economic conditions in alien's native country will not establish "extreme hardship" required for suspension of deportation in absence of evidence that conditions are unique to alien. *Kucimba v. INS*, 92 F.3d 496 (7th Cir. 1996).

The *Eighth Circuit* has held that economic loss relating to sale of alien's restaurant business did not compel finding of extreme hardship to alien. *Liu v. U.S. Dept. of Justice*, 13 F.3d 1175 (8th Cir. 1994). Yet, in *Carrete-Michael*

v. INS, 749 F.2d 490 (8th Cir. 1984), it held that in determining whether alien seeking suspension of deportation was faced with extreme hardship, the BIA gave "inadequate consideration to personal and emotional hardship to alien due to the division of his family and his inability to visit his brother and cousins in this country."

The *Ninth Circuit*, has stated that the BIA, in reviewing requests for suspension of deportation, should recognize the importance of the separation of family members from each other and devote careful scrutiny to this question. *See, e.g., Mejia-Carrillo v. INS*, 656 F.2d 520, 521-22 (9th Cir. 1981). The Ninth Circuit has gone so far as to state that "[t]he most important single factor may be the separation of the alien from family living in the United States" and that "separation from family alone may establish extreme hardship." *Mejia-Carrillo*, 656 F.2d at 522. It also considered it important to determine whether the cumulative effect of the particular hardships amounts to extreme hardship. *Prapavat v. INS*, 662 F.2d 561, 562 (9th Cir. 1981).

Finally, the *Tenth Circuit* has held that it is uniquely extreme, at or closely approaching outer limits of most severe hardship alien could suffer and so severe that any reasonable person would necessarily conclude that hardship is extreme. *Luna-Rodriguez v. INS*, 104 F.3d 313 (10th Cir. 1997).

Because of this inconsistency among the judicial circuits in interpretation of the meaning of the "extreme hardship" standard and the level of severity that it requires, the Supreme Court should review this case to

give a clear and unambiguous definition of "extreme hardship" as it applies to section 244(a)(2) of the Act.

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60555
Summary Calendar

OKWY GODWIN ACHUSI,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A29 573 882

(Filed Jul. 17, 1997)

Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:*

Okwy Godwin Achusi (Godwin) petitions for review of the Board of Immigration Appeals's decision that he will not suffer "extreme hardship" if he is deported to

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Nigeria. *See* 8 U.S.C. § 1254(a)(1). Godwin has failed to establish that he will suffer the type of unique or unusually severe hardship which would compel a finding of "extreme hardship" by the Board. *See Hernandez-Cordero v. INS*, 819 F.2d 558, 562-63 (5th Cir. 1987) (en banc). The Board did not abuse its discretion in denying his application for suspension of deportation. *See id.*

PETITION DENIED.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A29 573 882 – Dallas Date: AUG – 5 1996

In re: OKWY GODWIN ACHUSI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Ollie R. Jefferson, Esquire
1601 E. Lamar Boulevard, Suite 106
Arlington, Texas 76011

CHARGE:
Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – In United States in violation of law

APPLICATION: Suspension of deportation

The respondent has appealed from the Immigration Judge's August 1, 1995, decision denying his application for suspension of deportation under section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a). The appeal will be dismissed.

I. BACKGROUND & ISSUE

The respondent is a 38-year-old native and citizen of Nigeria who was admitted to the United States on April 15, 1987, as a nonimmigrant visitor, but he remained beyond the authorized period of his stay, which expired

on October 13, 1987. He has been married and divorced a total of four times, with three of his marital relationships having occured in the United States. He has no children with any of his former spouses, but he has a son, Erick Jackyl Webb, who was born on April 19, 1995, in Arlington, Texas, as a result of an extra-marital relationship with Francis Webb, a witness in these proceedings, that occurred in 1994.

By Order to Show Cause dated September 19, 1994, the respondent was placed in deportation proceedings for having overstayed his authorized visit. At a hearing held on February 1, 1995, the respondent conceded deportability, but requested an opportunity to apply for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, as well as suspension of deportation under section 244(a) of the Act. His adjustment of status application was based on his fourth marriage to Sharon Achusi, A United States citizen, from whom he had filed for divorce in 1994. Apparently, Ms. S. Achusi initially had filed a visa petition on the respondent's behalf on October 1, 1990, shortly after their September 4, 1990, marriage, but the couple separated in December 1992, and the petition was withdrawn in August 1994. Nevertheless, on January 31, 1995, she filed another visa petition on the respondent's behalf, which was approved on May 20, 1995. However, as the respondent's petition for divorce was granted on June 2, 1995, he subsequently notified the Immigration Judge that he no longer wished to pursue his adjustment of status application.

A hearing on the merits of the respondent's suspension of deportation application was held on August 1,

1995. At its conclusion, the Immigration Judge found that the respondent failed to satisfy the extreme hardship requirement of section 244(a) of the Act. Alternatively, the Immigration Judge denied suspension relief in the exercise of discretion. However, he granted the respondent the privilege of 6 months' voluntary departure in lieu of deportation pursuant to section 244(e) of the Act, 8 U.S.C. § 1254(e).

On appeal, the respondent argues that the Immigration Judge "abused his discretion in failing to grant" his application for suspension of deportation. More specifically, he argues that his deportation would result in extreme hardship to himself and his United States citizen child, Erick.

II. "EXTREME HARDSHIP"

In determining whether a respondent has met the extreme hardship requirement of section 244(a) of the Act, we consider the potential hardship to the respondent himself or to his spouse, parent, or child who is a citizen or lawful permanent resident of the United States. Hardship to other persons is not relevant under section 244(a) of the Act. *INS v. Hector,* 476 U.S. 85 (1986) (per curiam).

A. Definition

The phrase "extreme hardship" is not a definable term of fixed and inflexible meaning, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. *See Matter of Chumpitazi,* 16 I&N Dec. 629 (BIA 1978); *Matter of Kim,* 15 I&N Dec. 88

(BIA 1974); *Matter of Sangster*, 11 I&N Dec. 309 (BIA 1965). The standards for assessing an extreme hardship claim, however, are set forth in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978), and *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994). In considering all of the factors relevant to a determination of extreme hardship, the Supreme Court has indicated that a narrow interpretation of the term is consistent with the exceptional nature of suspension relief. *See INS v. Wang*, 450 U.S. 139 (1981).

B. Analysis

Having reviewed the record, we agree with the Immigration Judge that the respondent has failed to demonstrate that he or Erick would suffer extreme hardship within the meaning of the Act in the event of his deportation. The respondent's 9-year residence in this country is just 2 years over the statutory minimum required for suspension of deportation and, thus, not of a particularly lengthy duration. *See Matter of Uy*, 11 I&N Dec. 159, 160 (BIA 1965); *c.f. Matter of Roberts*, 20 I&N Dec. 294, 301 (BIA 1991) (finding that an alien's residence of 12 years was not unusual, particularly where the alien was an adult when the residence began). We observe that since 1992, the respondent has been the proprietor of a dry cleaning business with two part-time employees that has contributed to efforts to revitalize the downtown area of Arlington. Moreover, he faces deportation to Nigeria, which is indisputably a poor country with serious human rights problems. However, while political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as

advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige, supra,* at 882; *Matter of Anderson, supra,* at 598.

The respondent claims that he suffers from an ulcer and keloids, a skin condition primarily affecting persons of African descent, but these medical problems do not appear to be debilitating (Tr. at 124-25), and he has presented no evidence showing that adequate medical treatment would be unavailable to him in Nigeria. Even assuming that the health care system in Nigeria is not as "developed" as it is here and that prescription drugs are scarce, as the respondent testified, we do not consider this extreme hardship, particularly as the respondent indicated that he may be able to travel "overseas" for treatment (Tr. at 101-02). *See Matter of Correa,* 19 I&N Dec. 130 (BIA 1984).

We do consider it commendable that the respondent has made a positive impact on his community, and we note that he indicated at the hearing that he would lose his security deposit and suffer other financial losses if he were not given the opportunity to prepare for his deportation (Tr. at 98-99). However, in view of the grant of voluntary departure, the respondent should be able to find someone to buy his business who may be capable of continuing to provide dry cleaning services to downtown Arlington.[1]

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[1] In regard to the respondent's remaining community ties, we note that while the respondent is a member of the First United Methodist Church in Fort Worth, Texas, the record indicates that his membership is relatively recent, and

Additionally, we find no basis for believing that the respondent would be unable to make a suitable living for himself, or to provide financial support for Erick, notwithstanding the poor economic conditions existing in Nigeria. It is apparent that the respondent is a hard-working and industrious individual. According to his application (Form I-256A), he has accumulated $30,000 in cash or assets. He also indicated at the hearing that he is highly motivated, because he believes in providing for himself and his family (Tr. at 133-34). We further note that, prior to coming to the United States, the respondent was employed in Lagos at his uncle's restaurant (Tr. at 108, 139) and that his father is a "small businessman" in his hometown (Tr. at 138-39). Thus, while the respondent may experience some hardship in breaking the ties he has developed in this country and readjusting to life in Nigeria, we find that he clearly has failed to demonstrate that such hardship would be substantially different from or more severe than that suffered by the ordinary alien in deportation proceedings. *See, e.g., Hernandez-Cordero v. INS*, 819 F.2d 558 (5th Cir. 1987) (deportation of aliens with United States citizen children to Mexico after living in the United States for more than 7 years not extreme hardship); *Youssefina v. INS*, 784 F.2d 1254 (5th Cir. 1986) (deportation of alien with United States citizen daughter to Iran not extreme hardship); *see generally Matter of Ige, supra*, at 882-83 (discussing economic detriment and the hardship of readjustment).

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furthermore, that he is from the "Christian part" of Nigeria (Tr. at 91). Therefore, the respondent should experience little or no difficulty in joining or renewing ties to a congregation in his native country if he so desired.

As for the respondent's United States citizen son, Erick, we point out that an "alien illegally in the United States does not gain a favored status by the birth of a child in this country." *Id.* at 883. The respondent does not reside with Erick or provide support for him on a regular basis; instead, the respondent visits him three times a week for a few hours at a time and buys him clothing, milk, diapers, or pays the babysitter, when the toddler's mother, Ms. Webb, requests such support (Tr. at 75-77). Erick himself is in good health (Tr. at 85). Moreover, Ms. Webb is gainfully employed at Goodwill Industries as a production supervisor (Tr. at 64, 72, 85), and it is her niece who provides the babysitting services (Tr. at 75). We also note that Erick has a teenaged brother, Derrick, whom Ms. Webb has managed to raise despite his birth out of wedlock when she was a much younger woman (Tr. at 63, 66, 70). In short, while it certainly is unfortunate that Erick may be deprived of his father's presence in his life, this is a circumstance shared by numerous children in the United States, and under the facts of this case, it does not amount to extreme hardship for purposes of section 244(a) of the act. *See Osuchukwu v. INS*, 744 F.2d 1136, 1142 (5th Cir. 1984) ("[S]eparation of a child from his alien parent is not extreme hardship").

III. DISCRETION

In any event, we note that an application for discretionary relief may be denied in the exercise of discretion regardless of the respondent's statutory eligibility. *See Matter of Goldeshtein*, 20 I&N Dec. 382 (BIA 1991). In this

case, the Immigration Judge found the respondent undeserving of a discretionary grant of suspension of deportation in view of his "history of marital relationships" insofar as it relates to his immigration history (I.J. at 10). The respondent fails to rebut this finding on appeal.

Accordingly, we conclude that the Immigration Judge's denial of suspension of deportation was proper, and the respondent's appeal from that decision will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris,* 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and, in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ Mary Illegible Dunne
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Dallas, Texas

File No.: A 29 573 882 August 1, 1995

In the Matter of)
) IN DEPORTATION
OKWY GODWIN ACHUSI) PROCEEDINGS
)
Respondent)

CHARGE: Section 241(a)(1)(B) of the Immigration and Nationality Act; visa overstay

APPLICATIONS: Sections 244(a) and 244(e) of the Immigration and Nationality Act; suspension of deportation and, in the alternative, voluntary departure

ON BEHALF OF RESPONDENT:

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ON BEHALF OF SERVICE:

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ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 37 year old unmarried male alien, a native and citizen of Nigeria, who entered the United States on 15 April, 1987 at New York, New York as a nonimmigrant visitor. On 19 September, 1994, an Order to Show Cause was issued charging the respondent with deportability under the above referenced section of the Immigration and Nationality Act (Act). Respondent, through counsel, admitted the allegations contained in

the Order to Show Cause and conceded deportability. Nigeria was designated as the country for deportation.

On the basis of the respondent's knowing admissions through counsel, deportability has been established by evidence which is clear, convincing and unequivocal. *Woodby v. INS*, 385 U.S. 276 (1966).

Respondent sought the relief of suspension and, in the alternative, voluntary departure. The respondent initially sought additionally the relief of adjustment of status; however, the marriage upon which the visa petition was submitted was terminated prior to these proceedings. Counsel for respondent previously notified the Court of the fact that suspension and voluntary departure would be the only forms of relief sought.

Prior to beginning today's proceedings, counsel for respondent sought a continuance in this case in order to seek additional evidence in support of the application for suspension of deportation. Counsel indicated that the primary form of relief upon which she had hoped to rely was adjustment of status. Counsel had previously notified the Court approximately six weeks ago of the fact that adjustment of status would not be pursued. Additionally, it appears from the evidence of record which will be discussed in greater detail later in the body of this opinion, that a divorce petition had been filed during calendar year 1994. A new visa petition was submitted by the respondent's then spouse in later January of 1995 and ultimately approved by the Immigration Service. During the interim, it appears that circumstances between the parties changed significantly and a divorce was granted on 2 June 1995. Counsel for respondent continued to

assert that she had had an insufficient amount of time to prepare such additional evidence as might assist the respondent in the presentation of his application for suspension of deportation. Finding no good cause shown for the requested continuance, the documentary evidence which was submitted well after the Court's required service deadlines was accepted and respondent and counsel were permitted to extensively modify the suspension application. A continuance was denied.

In order to qualify for suspension of deportation, the respondent must establish that he has seven years physical presence in the United States, is a person of good moral character, that extreme hardship to himself or a qualifying family member would occur and, lastly, that he is entitled to a favorable exercise of discretion. In this particular case, the respondent claims that deportation would result in extreme hardship to himself and to a recently born United States citizen child, which was not born of his recent marriage.

In support of his application for relief, the respondent submitted, in addition to the suspension application itself, documentary evidence consisting of a number of group exhibits relating to the birth certificate of the aforementioned child, reports on political and economic conditions in Nigeria, articles relating to his business and evidence attesting to his good moral character and church attendance.

The Government submitted no documentary evidence in rebuttal and additionally provided no rebuttal testimony.

Testimonial evidence was provided through the testimony of the mother of the aforementioned United States citizen child and the respondent himself.

The record establishes that the respondent has been physically present in the United States for a continuous period of at least seven years. I find that he has no departures from the United States which would break this chain of residence and he had met that necessary eligibility requirement.

Upon review of the available evidence, I find that the respondent is not precluded statutorily from establishing good moral character as defined in Section 101(f) of the Act. The fact that a person is not within any of these enumerated classes shall not preclude a finding of bad moral character. The record on its face suggests however that the respondent has been in no legal difficulties in the United States with the exception of his immigration problems and some traffic tickets. Accordingly, I find that the respondent is statutorily eligible under the good moral character requirement.

The respondent also bears the burden of establishing extreme hardship in this case. The factors to be considered include: age; family ties in the United States and abroad; conditions of health; economical and political conditions in the designated country for deportation; financial status; possibility of other means of adjustment; whether or not the respondent has been of special assistance to the United States or the local community; health of the respondent and qualifying family members; and the respondent's immigration history. *See Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

The testimonial and documentary evidence of record suggests that the respondent relies, in seeking to establish extreme hardship, on the difficulties which will occur to himself and to his recently born son if he were to be deported. The respondent has been in the United States since 1987 and, since 1992, has established a dry cleaning business which he operates as owner. The respondent does not actually perform the dry cleaning services himself but rather subcontracts out such services and accordingly has some fixtures and other minimal property relating to the operation of the business but no significant investment in large dry cleaning equipment. Further, the respondent operates under a lease agreement but does not own the building. No evidence was presented as to any significant real or personal property holdings in the United States.

The circumstances surrounding the relationship with the respondent's son create perhaps as many questions as they do answers. The respondent, while apparently married to but separated from his most recent United States citizen spouse (who had submitted and later withdrawn an I-130 visa petition on his behalf), became acquainted with the mother of the aforementioned child during the summer of 1994. The woman became pregnant and the child was born in April of 1995. Although not being accorded the respondent's last name, the evidence is unrefuted that the respondent is listed as the father on the birth certificate. The mother of the child testified that the respondent provides clothing and diapers and helps her in paying for day care services but pays no formal level of support either by agreement or through court order. Respondent testified that the birth of a male child

in his culture is an important event and he cares deeply for the child and wants the best for his future. The respondent further testified that he believes it would be difficult for him to have a positive effect on his son's life, from either a role model or economic standpoint, if he were to be deported to Nigeria. The testimonial evidence of record suggests that the mother of the child has no intention in marrying the respondent.

The respondent provided further testimony regarding current political and economic conditions in Nigeria which he describes and which some evidence of record suggests are descriptive of a country in significant political and economic turmoil. The government of Nigeria has, as a matter of general knowledge also, been the subject of extreme criticism from international organizations as well as the Government of this country regarding its current political management of the nation as well as for human rights violations. Respondent described himself as a member of a subelement of the Ibo tribe and indicated that the government is somewhat oppressive toward people in his part of Nigeria. The respondent presented no evidence of any unique or personal potential for persecution or hardship but rather his claim is a speculative generalization of the types of difficulties and a significant decrease in economic opportunity if he were to be deported to Nigeria. This Immigration Judge clearly accepts the fact that the respondent's economic opportunities in Nigeria are substantially less than those available to him in the United States whether or not he would continue to operate a dry cleaning business.

The respondent presented evidence that he suffers from ulcers and a skin condition unique to his race which

creates a significant possibility of cysts or scar tissue in or near follicle growth on the head and facial area. The respondent testified that he believes he would have difficulty in obtaining the appropriate medicines in Nigeria.

I've had an opportunity to observe the testimony and demeanor of the respondent and, while I find him to have been an engaging individual who comports himself appropriately before the Court, I have some question as to the complete nature of his credibility in these proceedings. In the view of this Immigration Judge, the extent of his answers in both direct and cross examination have been over-reaching in terms of the impact to himself if he were to be deported. A number of his answers were speculative at best and the nature and circumstance and history of his most recent attempt to adjust his status creates significant questions as to whether or not this gentleman has previously attempted to perpetrate fraud on the United States Government through his most recent (and I emphasize only through his most recent) I-130 visa application. While I am unimpressed with the totality of his testimony as such relates to credibility, I do not believe that there are sufficient objective factors evident in the record to cause me to make an absolute finding that he is not a credible witness. The weight to be accorded his testimony accordingly will relate to each individual aspect of his testimony as such relates to the relevant and probative issues before the Court.

On balance and considering the totality of the evidence of record, I find that the respondent has been unable to establish that his deportation would result in extreme hardship to himself or to his United States citizen son. The Supreme Court in *INS v. Wang*, 450 U.S. 139

(1981) held that extreme hardship in suspension of deportation requires extraordinary circumstances and was not to be awarded merely to those who could avoid being previously deported and who have had children who are United States citizens. The respondent's business holdings are such that it would appear that he can liquidate his business and utilize the resources to assist him in his relocation to Nigeria. In the opinion of this Immigration Judge, to rule otherwise on the issue of extreme hardship in this particular case would provide an unfair advantage to those who do abide by the immigration laws of this couhtry and wait their turn.

Respondent provided testimonial evidence suggesting that he was willing to depart the United States and had the resources to do so. Accordingly, I find that he has established the eligibility prerequisites necessary for voluntary departure.

On the question of discretionary relief, and assuming for purposes of argument that an appellate body should find that this Immigration Judge had erred with regard to extreme hardship eligibility factors, I find an important distinction between discretionary relief accorded on the basis of suspension of deportation versus voluntary departure. Suspension of deportation would essentially legitimize an individual's status in this country and is a far greater form of relief than voluntary departure. Accordingly, I place a greater burden on respondent to be recognized for such discretionary relief than I would for voluntary departure. In this regard, I find the respondent's pattern of conduct with regard to his history of marital relationships and the petitions filed, withdrawn, refiled during the pendency of divorce proceedings all to

cause me to believe that he would have knowingly done anything to remain in the United States. I find therefore that he is unworthy of the discretionary relief associated with suspension of deportation.

Believing the discretionary aspect of relief relating to voluntary departure to be a somewhat lesser standard and noting his lack of any criminal record in the United States, and taking further note of his business holdings in the United States, I will grant voluntary departure in this matter out of an abundance of caution though I remain unimpressed with the respondent's immigration history in this country. In his favor I do note that he has, despite living here illegally and under some questionable circumstances with regard to his marriages, he's been a hard-working and energetic and motivated individual who has kept himself free of any criminal involvement. Accordingly, voluntary departure in this case will be granted.

On the basis of the totality of the evidence of record and considering the respondent to be both statutorily ineligible and unworthy of discretionary relief of suspension of deportation, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's application for relief in the nature of suspension of deportation be denied.

IT IS FURTHER ORDERED that the respondent's application for relief in the nature of voluntary departure be granted through the lst of February 1996 or by such other date and under such conditions as may be directed

by the District Director of the Immigration and Naturalization Service. In the event the respondent fails to depart the United States by the date required, the privilege of voluntary departure shall be withdrawn without benefit of any further or future proceedings and the respondent shall be ordered deported to the nation of Nigeria.

/s/ D. Anthony Rogers
D. ANTHONY ROGERS
Immigration Judge

August 1, 1995